

2-2.000

PROCEDURE WITH RESPECT TO APPEALS GENERALLY

- 2-2.110 Decision Against the Government -- Immediate Report Of Adverse Decision
 - 2-2.111 Prompt Recommendation Concerning Further Appellate Review
 - 2-2.112 Recommendations Concerning Interlocutory Appeal Under 28 U.S.C. § 1292(b)
 - 2-2.121 Necessity of Authorization by Solicitor General -- Appeals or Petitions on Behalf of United States
 - 2-2.122 Necessity of Authorization by Solicitor General -- Rehearing En Banc
 - 2-2.123 Necessity of Authorization by Solicitor General -- Amicus Brief
 - 2-2.124 Necessity of Authorization by Solicitor General -- Petitions seeking Mandamus or Other Extraordinary Relief
 - 2-2.131 Serving and Filing Notice of Appeal -- Upon Decision to Appeal or Cross-Appeal
 - 2-2.132 Serving and Filing Notice of Appeal -- Pending Decision to Appeal or Cross-Appeal
 - 2-2.140 Rehearing En Banc
 - 2-2.150 Preserving Government's Rights Pending Review
 - 2-2.200 Procedure Where Appeal is Taken by Adverse Party to Court of Appeals
 - 2-2.300 Procedure in Interlocutory Appeals Under 28 U.S.C. § 1292(b) -- Generally
 - 2-2.311 Government Seeking Interlocutory Appeal -- Solicitor General Authorization
 - 2-2.312 Filing of 1292(b) Petition with Court of Appeals
 - 2-2.320 Procedure for Interlocutory Appeals Available as of Right
 - 2-2.330 Procedure When Adverse Party Seeks Interlocutory Appeal
 - 2-2.400 State Court Proceedings
 - 2-2.510 United States Supreme Court Review -- Responsibility in Appeals or Certiorari by United States Generally
 - 2-2.520 United States Supreme Court Review -- Appeal/Petition for Certiorari by Adverse Party
 - 2-2.530 United States Supreme Court Review -- Service of Papers Upon United States Attorney
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2-2.110 Decision Against the Government -- Immediate Report of Adverse Decision

In any civil or criminal action before a United States District Court or a United States Court of Appeals, in which the United States is a litigant, and a decision is rendered adverse to the government's position, the United States Attorney must immediately transmit a copy of the decision to the appellate section of the division responsible for the case. This includes cases being handled by a division of the Department, unless the United States Attorney is unmistakably advised by the court rendering the decision that service of a copy of the decision has been made upon the division of the Department, or the Departmental attorney, handling the case.

2-2.111 Prompt Recommendation Concerning Further Appellate Review

In any case being handled by a United States Attorney in which the decision is adverse to the government in whole or in part, and is or may be reviewable, the United States Attorney must promptly make a report to the appropriate division of the Department (preferably within two days after receipt of the opinion). The report should be in the following format:

CASE HEADING: Case name, court number, district (or circuit), and date of decision.

TIME LIMIT: State when time expires for seeking the appropriate review.

RECOMMENDATION: State whether the United States Attorney recommends for or against review, the type of review sought, i.e., rehearing en banc, appeal or certiorari, and the name of the court to which the review should go. In civil cases, any known agency should be noted.

QUESTIONS PRESENTED: A brief statement of the issues presented for review.

STATEMENT: Summarize as briefly as practicable the facts necessary for resolution of the question presented.

DISCUSSION: State the arguments for or against seeking review and provide citations of relevant authorities. Also note any problems with the recommended position, flagging all issues relevant to the Solicitor General's decision whether to authorize appeal. Attach appropriate documents (only those reasonably necessary to analysis of the relevant issues), including copies of opinions, findings of fact, conclusions of law, judgments, briefs and memoranda. In general, transcripts of testimony should not be specially ordered for this purpose, unless of central importance or requested by the appropriate division or the Solicitor General. The United States Attorney should indicate his/her preference, if any, as to who should handle the appeal. *See* USAM 2-3.100.

Please note the jurisdictional time limits of USAM 2-4.000.

2-2.112 Recommendations Concerning Interlocutory Appeal Under 28 U.S.C. § 1292(b)

Because of the short period of time (10 days) allowed by the statute for making application for interlocutory appeals, the appropriate division of the Department should immediately be advised by telephone in every case in which the United States Attorney believes that the government should seek certification for such an interlocutory appeal or in which the district court has stated in its order that a controlling question of law is involved. *See* 28 U.S.C. § 1292(b). All the necessary papers should immediately be transmitted to the appropriate division of the Department. *See* Procedure In Interlocutory Appeals, at USAM 2-2.300.

2-2.121 Necessity of Authorization by Solicitor General -- Appeals or Petitions on Behalf of United States

All appeals to the lower appellate courts in cases handled by divisions of the Department and United States Attorneys, and all petitions for certiorari and direct appeals to the Supreme Court must be authorized by the Solicitor General. This includes interlocutory appeals and appeals to state appellate courts.

2-2.122 Necessity of Authorization by Solicitor General -- Rehearing En Banc

The prior authorization of the Solicitor General (through the appropriate division of the Department) must be obtained for the filing of a suggestion for rehearing en banc in a court of appeals. The prior authorization of the Solicitor General is not required for a petition for rehearing by the same panel which heard the case; however, such a petition should not be filed until the appropriate division has been notified and, where the division believes

it appropriate, the Solicitor General's office has been given the opportunity to decide whether the case merits en banc review.

2-2.123 Necessity of Authorization by Solicitor General -- Amicus Brief

The authorization of the Solicitor General is required for the filing of any amicus brief in all appellate courts. *See* 28 C.F.R. 0.20(c).

2-2.124 Necessity of Authorization by Solicitor General -- Petitions Seeking Mandamus or Other Extraordinary Relief

The authorization of the Solicitor General is required for the filing of petitions in appellate courts for the issuance of extraordinary writs.

2-2.131 Serving and Filing Notice of Appeal -- Upon Decision to Appeal or Cross-Appeal

When a decision has been made to appeal or cross-appeal, the United States Attorney is responsible for serving and filing a notice of appeal or cross-appeal on behalf of the United States or any officer or agency thereof in any case in which the United States or any officer or agency thereof is a party. This applies to appeals to the Supreme Court (*see* Rule 18, Rules of Supreme Court) as well as to the courts of appeals.

With respect to notices of appeal to the Supreme Court, if proof of service is by certificate, the attorney signing the certificate must be a member of the bar of the Supreme Court. Rule 29.5(b), Rules of the Supreme Court. The appropriate division should be promptly notified by the United States Attorney when the notice of appeal has been filed.

2-2.132 Serving and Filing Notice of Appeal -- Pending Decision to Appeal or Cross-Appeal

If the time for appeal or cross-appeal is about to expire (*see* time limitations, USAM 2-4.000) and the United States Attorney has not received notice from the appropriate division of the Department as to whether an appeal is to be taken, a "protective" notice of appeal should be filed in order to preserve the government's right to appeal. Such action should be reported to the appropriate division of the Department. In order that the Department may have adequate time to consider the case, such notice of appeal or cross-appeal should not be filed sooner than five days before the time for appeal or cross-appeal expires.

NOTE: *See* USAM 2-3.222 which relieves the United States Attorney of the responsibility for filing a notice of appeal in social security cases in which the claim is for benefits.

2-2.140 Rehearing En Banc

F.R.A.P. 40 now gives the government 45 days in which to seek rehearing in a civil case. Since the time was extended to 45 days in a civil case from the former 14 day period in order to accommodate the government's need for extra time, extensions of the 45-day time period should not be sought without extraordinary cause and consultation with the appropriate division in the Department. The government has 14 days to seek rehearing in a criminal case. F.R.A.P. 40.

2-2.150 Preserving Government's Rights Pending Review

In cases being handled by the United States Attorney, that office shall be responsible in courts other than the Supreme Court for preserving the government's rights pending review and also pending determination of the question whether review should be sought. In consultation with the appropriate division, steps shall be taken as necessary to stay the issuance of mandates by the courts of appeals, if the issuance of the mandate might prejudice the government's interests. If a court of appeals refuses to stay the mandate or conditions its stay upon the seeking of review within a stated period, the Department shall immediately be informed of such fact. The Department shall likewise be informed if a district court refuses to stay further proceedings or execution of its judgment, or imposes conditions on review.

In cases handled by the Department, the appropriate division will be responsible for taking any steps necessary to preserve the government's rights.

2-2.200 Procedure Where Appeal is Taken by Adverse Party to Court of Appeals

When an appeal to a court of appeals is taken in a government case by the adverse party, the United States Attorney shall promptly advise the appropriate division of the Department, and forward to the division a copy of the notice of appeal and the district court's opinion and judgment. The United States Attorney shall also advise of any motion filed by the appellant for a stay or injunction pending appeal or for any other emergency relief, and forward copies of those motions to the appropriate division.

2-2.300 Procedure in Interlocutory Appeals Under 28 U.S.C. § 1292(b) -- Generally

Subsection (b), 28 U.S.C. § 1292, authorizes the courts of appeals to entertain appeals from certain non-final orders entered by the district court (1) if the district court has stated in writing, in the order, that it involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from it may materially advance the ultimate termination of the litigation, and (2) if permission to appeal is granted by the court of appeals. Upon application within 10 days after entry of the order, the court of appeals may, in its discretion, allow an appeal to be taken. Examples of orders which may be appropriate for appeal under 28 U.S.C. § 1292(b) are orders overruling a defense going to the right to maintain the action, such as a challenge to capacity or to jurisdiction; orders refusing to permit joinder of a third-party defendant; and orders transferring cases to other district courts under 28 U.S.C. § 1404 in which the jurisdiction of a transferee court is in issue.

2-2.311 Government Seeking Interlocutory Appeal -- Solicitor General Authorization

If a district court makes an interlocutory ruling adverse to the government and it is believed that a 28 U.S.C. § 1292(b) appeal is appropriate, the United States Attorney should promptly request authorization for the appeal from the Solicitor General through the appropriate division. The United States Attorney should not ask that the district court certify any issue for a Section 1292(b) appeal until receiving the Solicitor General's authorization to proceed. Only upon receipt of this authorization should the United States Attorney apply to the district court for inclusion in the order the certification required under 28 U.S.C. § 1292(b).

If a district court certifies an issue for a Section 1292(b) appeal before the United States Attorney seeks, and/or receives, the Solicitor General's authorization, the United States Attorney should promptly contact the

appropriate division for advice as to how to proceed. The division will consult with the Office of Solicitor General and where appropriate and feasible obtain approval to proceed with the appeal within the 10-day time period.

2-2.312 Filing of 1292(b) Petition with Court of Appeals

Within 10 days after a district court certifies an issue pursuant to 28 U.S.C. § 1292(b), the prospective appellant must file a petition under Rule 5, F.R.A.P., with the court of appeals requesting its permission for an interlocutory appeal. This 10-day period is jurisdictional and therefore may not be extended upon stipulation of the parties.

2-2.320 Procedure for Interlocutory Appeals Available as of Right

In some circumstances a party can appeal an interlocutory order of a district court as of right. *See, e.g.*, 28 U.S.C. § 1292(a) (which lists a number of interlocutory orders, including, in particular, orders granting or denying injunctions, which can be appealed as of right, and without the need for a certification under 28 U.S.C. § 1292(b)); F. R. Civ. P. 54(b) (which allows a district court to certify that part of a case involving multiple claims or multiple parties is immediately appealable); and *Bivens* cases (in which the denial of official immunity is immediately appealable). If a United States Attorney intends to recommend appeal from an interlocutory order which is appealable as of right, the United States Attorney should promptly forward the order and his/her recommendation to the appropriate division. While the tight time limits of 1292(b) appeals do not apply to appeals as of right, it is nonetheless advisable to speed up the process of obtaining appeal authorization of any interlocutory appeal, to the extent feasible.

2-2.330 Procedure When Adverse Party Seeks Interlocutory Appeal

Whenever opposing counsel asks that a district court certify an issue for a Section 1292(b) interlocutory appeal, the United States Attorney should promptly notify the Chief of the Appellate Section of the appropriate division, and consult with that Chief concerning whether to oppose or acquiesce in opposing counsel's request. The Chief of the Appellate Section should also be notified where the district court, sua sponte, certifies an order for interlocutory review. If the United States Attorney receives service of a petition for interlocutory appeal, the United States Attorney should immediately forward it to the appropriate division.

2-2.400 State Court Proceedings

In litigation in the state courts, the United States Attorney should promptly inform the appropriate division of the Department as to all decisions, including those adverse to the United States and subject to review in a higher state court. In all of these cases, the United States Attorney should follow the general procedures established for appeals from United States district courts to courts of appeals. If the procedural steps involved in the taking or perfecting of the appeal raise an issue which bears upon the merits of the case, the United States Attorney should promptly inform the Appellate Section of the appropriate division and secure its advice with respect to that issue, but in any event the necessary protective action should be timely taken.

2-2.510 United States Supreme Court Review -- Responsibility in Appeals or Certiorari by United States Generally

Litigation in the Supreme Court, by or against the government, is handled by the Solicitor General. The responsibility of the United States Attorney goes only to filing the notice of appeal and preserving rights pending review, as set forth below. The United States Attorney may also be asked to have the clerk of the appropriate court send up the record needed either on direct appeal or on petition for a writ of certiorari. If the Solicitor General has authorized an appeal to the Supreme Court from a decision by the highest court of a state, the aid of the United States Attorney may be sought by the Department in the filing of the appeal papers in the state court.

2-2.520 United States Supreme Court Review -- Appeal/Petition for Certiorari by Adverse Party

Responses to petitions for writs of certiorari and proceedings by the government in connection with an appeal by an adverse party will be handled by the Department.

When an appeal from a district court to the Supreme Court is taken by the adverse party in a case being handled by the United States Attorney, the United States Attorney should notify the Appellate Section of the appropriate division immediately and should make sure that copies of all necessary papers and documents are transmitted at once to the Department.

When an appeal from a district court to the Supreme Court is taken by the adverse party in a case being handled by a division of the Department, the United States Attorney should immediately notify the appropriate division and forward a copy of the district court decision unless the Court in its transmittal letter or memorandum forwarding the decision indicates distribution of a copy of the decision to the division of the Department, or to the Departmental attorney handling the case.

2-2.530 United States Supreme Court Review -- Service of Papers Upon United States Attorney

If the United States Attorney is served with papers (other than a notice of appeal) in proceedings before the Supreme Court, the United States Attorney should inform counsel that service must be made upon the Solicitor General in Washington, D.C., as required by Rule 29.4 of the Rules of the Supreme Court. The United States Attorney should inform the Solicitor General promptly of all attempts to make service upon him/her.